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NETAPP, INC.,

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NETWORK APPLIANCE, INC.,

Plaintiff-Counterclaim Defendant,

v.

SUN MICROSYSTEMS, INC.

Defendant-Counterclaim Plaintiff.

Case No. C 07-06053-EDL

**DECLARATION OF DAVID HITZ IN
SUPPORT OF NETAPP, INC.'S
OPPOSITION TO DEFENDANT SUN
MICROSYSTEMS, INC.'S MOTION FOR
PARTIAL STAY**

PUBLIC VERSION

1 I, David Hitz, declare:

2 1. I am one of the co-founders of NetApp, Inc. ("NetApp") and now serve as
3 executive vice president. If called upon as a witness, I could competently testify to the truth of
4 each statement herein.

5 2. NetApp is a pioneer in the field of data storage systems. Our innovative storage
6 and data management solutions are used by organizations around the world to store, manage,
7 protect and retain data. Since I founded NetApp in 1992, it has quickly grown to a tremendously
8 successful Fortune 1000 Company that employs over 6,600 employees in 113 worldwide offices.
9 NetApp's revenues exceeded \$2.8 billion in fiscal year 2007.

10 3. NetApp's patents cover a host of advanced features that greatly enhance the
11 performance, reliability and usability of NetApp's award-winning Data ONTAP® storage
12 operating system and Write Anywhere File Layout (WAFL®) filesystem.

13 4. I am a named inventor on United States Patent Nos. 5,819,292 ("the '292 patent"),
14 6,857,001 ("the '001 patent"), and 6,892,211 ("the '211 patent"), which are directed to NetApp's
15 core WAFL® technology.

16 5. Sun's ZFS technology appears to be a conscious reimplementations of NetApp's
17 innovative WAFL filesystem, as admitted by the creators of ZFS: "The file system that has come
18 closest to our design principles, other than ZFS itself, is WAFL . . . the first commercial file
19 system to use the copy-on-write tree of blocks approach to file system consistency." Attached as
20 Exhibit A to this declaration is a true and correct copy of Bonwick, J., et al., "The Zettabyte File
21 System."

22 6. NetApp seeks a speedy resolution of this litigation, not only for the normal reasons
23 one would want a major dispute resolved promptly, but for all the specific reasons set forth
24 below. To that important end, NetApp stipulated with Sun to appear before this Court with the
25 goal of a prompt resolution of the disputes.

26 7. If the Court grants Sun's motion for a partial stay pending reexamination of the
27 '292, '001, and '211 patents, NetApp will be unduly prejudiced, as described in further detail
28

below, by the resulting delay in adjudicating whether ZFS infringes those patents.

Irreparable Harm to NetApp Through Sun's Open Sourcing of ZFS

8. Sun has open-sourced ZFS and thereby given away for free NetApp's patented technology to anyone that wants to download a copy. That means Sun has created infringing computer code and made it easy for software users and software companies everywhere to infringe, instead of having users compensate NetApp for its technology through normal product purchases. This is not much different from the problems caused when an entity builds a business by distributing for free infringing copies of music. In both cases, there are practical problems in any attempt to recover the infringing copies or to enforce rights against everyone that has downloaded copies of the infringing software. One difference is that adoption of ZFS requires time because it is a software program and not just a song. The next two or three years are very significant for the proliferation of ZFS and it is vital to shut down Sun's distribution promptly.

9. Because ZFS is open-sourced, NetApp will be unduly prejudiced by a delay in the resolution of this dispute. This is not an instance of one entity infringing, but a whole industry of infringement being created. Thus, time is of the essence. NetApp can never hope to retrieve or erase every copy of ZFS that has ever been downloaded. We aren't against open source, and we aren't even against non-commercial use of ZFS, but if NetApp must wait years for a decision that ZFS infringes its patents, it will be impossible to put the proverbial horses back into the barn.

Irreparable Harm to NetApp's Market Position

10. It is my understanding that Sun has recently started marketing the Sun Fire X4500 server, which runs OpenSolaris and ZFS. The Sun Fire X4500 directly competes with NetApp products

REDACTED

The longer the issues in this litigation remain unresolved, the greater the risk of erosion of NetApp's market share which could create incalculable damage that is difficult to remedy.

11. Because Sun is exploiting NetApp's patented technology for free and creating interest in ZFS by giving it away for free, it does not have to cover the true cost of incorporating ZFS into the Sun Fire X4500 and marketing it. Sun is thus able to undercut NetApp's pricing on

1 a per gigabyte basis, like any counterfeiter. This negatively affects NetApp's ability to compete
2 in the storage space. In responding to normal market pressures, NetApp would have to consider
3 shrinking its normal profit margins. Reduced profit margins in this marketplace can be
4 permanent and difficult to quantify.

5 12. I expect that within the next 3-5 years, Sun will introduce other data storage
6 products incorporating ZFS and potentially copying other proprietary features developed by
7 NetApp. In my experience, the market landscape for technology companies shifts quickly. A
8 delay of even a few years can be equivalent to several product lifetimes.

9 13. Sun is not the only company that could potentially hurt NetApp's market position.
10 Because Sun freely licenses ZFS to other companies, it is possible that the entire competitive
11 profile of the data storage market might change within the next 3-5 years.
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19 14. Moreover, because ZFS is open-sourced, it lowers the barrier to entry for startup
20 companies to bring products incorporating ZFS technology to market and start competing with
21 NetApp. Indeed, because Sun is distributing ZFS at no cost, it dramatically lowers the product
22 development costs for any company, not just startups.

23 15. If NetApp were forced to wait for years until the conclusion of the reexamination
24 proceedings, the sheer number of potential competitors in the data storage space at that time could
25 effectively prevent NetApp from enforcing its patents after the reexamination process has been
26 completed.
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Irreparable Harm to NetApp's Reputation

16. NetApp has developed a loyal customer base by being an innovator in the field of data storage systems. NetApp's patents cover features that have become known as signature features of NetApp products. The incorporation of NetApp's proprietary features in ZFS dilutes the unique position in the marketplace that NetApp currently enjoys.

17. Sun has launched a communications campaign to disparage NetApp by publicly accusing NetApp of attempting to stifle the open source community by asserting its patents to stop Sun's infringement. Indeed, Sun's CEO has openly called NetApp a patent troll. Attached as Exhibit B is a true and correct copy of the website <http://blogs.sun.com/jonathan/date/200710>, which purports to be Jonathan Schwartz's October 24, 2007 blog entry.

18. The longer this litigation continues and the more Sun encourages others to use ZFS, the more established the use of ZFS may become and the more disruptive NetApp's future attempts to enforce its patents will be. NetApp could be blamed for that disruption, which could result in even further harm to NetApp's reputation. Sun is obviously attempting to exploit this problem for NetApp and allowing it to further protract NetApp's assertion of the '292, '001, and '211 patents would provide it with an unfair ability to attack NetApp.

19. I am painfully aware that IP litigation is not favorably viewed by many members of the open source community. Indeed, the mere participation in a lawsuit can bear a reputational cost. Aside from the obvious monetary costs of protracted litigation and the distraction of resources from normal business functions, if the Court grants Sun's motion for a partial stay, NetApp will suffer irreparable harm to its reputation because it will prolong this whole matter rather than allowing for a prompt disposition.

Irreparable Harm to the Open Source Community/Public Interest

20. If it remains unsettled whether ZFS infringes NetApp's patents, users of ZFS may also be harmed by the delay, particularly if members of the open source community are misled by Sun into believing that NetApp's patents are invalid. It certainly doesn't help the open source movement to give away code that infringes someone else's patent rights. It is possible that

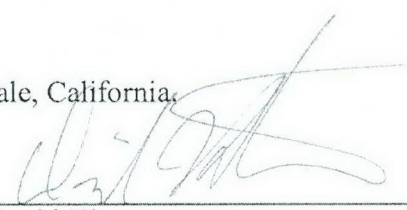
1 adopters of ZFS will invest substantially in ZFS in developing their businesses and technology
2 only to have to abandon those investments when infringement is established. Others will await
3 resolution of this litigation before determining what they can and cannot do with ZFS. The
4 sooner we determine the true status of ZFS, the better it will be for everyone.

5 * * *

6 21. The information contained in this declaration pertains to NetApp's confidential
7 business strategies and analysis of the storage systems market. There is a risk that NetApp would
8 be adversely affected if the contents of this declaration were not protected from disclosure and
9 misuse. For example, to the extent that startups or vendors currently distributing servers
10 equipped with Solaris are not already considering integrating ZFS into products and becoming
11 new competitors of NetApp, the concerns expressed herein could become a self-fulfilling prophesy
12 if not filed under seal.

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14 I declare under penalty of perjury that the foregoing is true and correct to the best of my
15 knowledge and belief.

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17 Executed on April 29, 2008 at Sunnyvale, California.

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19 _____
20 David Hitz
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